Public Prosecutor v Inthiran a/l Renganathan & Ors

HIGH COURT (ALOR SETAR) — PJK NO 45–12 OF 2004
MOHD SOFIAN JC
10 APRIL 2007

Criminal Law — Murder — Cause of death — Whether death could have been caused by craniotomy surgery which was performed subsequently and not injuries sustained in attack — Penal Code ss 149 & 302

Criminal Procedure — Trial — Prosecution's case — Cause of death — Whether death could have been caused by craniotomy surgery which was performed subsequently and not injuries sustained in attack

Criminal Procedure — Trial — Prosecution's case — Whether failed to establish chain of causation linking death of deceased to injuries sustained

Evidence — Adverse inference — Failure of prosecution to call material witness — Whether non-calling of neurosurgeon surgeon who performed craniotomy surgery was fatal to prosecution — Whether inference favourable to accused should be accepted — Evidence Act 1950 s 114(g)

Evidence — Circumstantial evidence — Murder — No finger print evidence or DNA report tendered — Whether any direct evidence pointing accused to the crime

Evidence — Identification evidence — Poor quality of — Contradictory evidence by eye witnesses — No identification parade held for witnesses to identify accused — Whether accused properly identified

The seven accused were charged under s 302 Penal Code read together with s 149 Penal Code for, while being members of an unlawful assembly, causing the death of the deceased. The deceased sustained injuries on 22 September 2003 and was brought to the Sungai Petani Hospital the same night, where on 23 September 2003, a surgical procedure known as craniotomy was conducted on the deceased. The deceased died on 25 September 2003.

At the end of the prosecution's case the defence submitted that: (1) the prosecution had failed to establish the chain of causation linking the death of the deceased on 25 September 2003 to the injuries sustained on 22 September 2003; (2) the prosecution had failed to call any witnesses who could have assisted the court in

regard to the injuries sustained by the deceased and the cranitomy surgery which was performed subsequently; (3) the favourable inference was that there could have been a blunder during the craniotomy surgery done on the deceased that led to his death; and (4) on the issue of identify, the only witness who appeared to have seen the deceased being assaulted on that night was SP9 but his evidence was extremely suspicious, as it was in material contradiction with that of SP5, his father. SP9 claimed that he saw the deceased being assaulted by three Indian youth. He also identified the first, fourth and fifth accused from the dock.

Held, acquitting and discharging all the accused:

(1) After going through the evidence and using the maximum evaluation test, the non-calling of the neurosurgeon surgeon who performed the craniotomy surgery was fatal to the prosecution. There were many questions which remained unanswered, for example if the craniotomy surgery had not being done, would the deceased have survived despite the severe injuries. The calling of the neurosurgeon was of considerable significance because it could have either corroborated SP3's evidence that the craniotomy surgery was not the cause of the deceased's death. Section 114(g) of the Evidence Act 1950 should in these circumstances been drawn. The failure to do so would have occasioned a miscarriage of justice (see paras 43–44).

(2) On the issue of identification, there were material contradictions between SP5 and SP9. Also the incident happened about two years ago from the date SP9 gave evidence in court. Furthermore SP9's identification being merely dock identification was wholly unsatisfactory. This was compounded by the fact that there was no identification parade held in order for the witnesses to identify any of the seven accused. In the light of this evidence, there was no nexus between the three Indian youth and the seven accused. None of the prosecution witnesses had identified any of seven accused as one or three of the Indian youth who had assaulted the deceased (see paras 45–47).

(3) In order to implicate the accused with murder, the prosecution must proved that at least one or all the three Indian youth were seen assaulting the deceased in order for s 149 Penal Code to come into effect. As its stands all evidence was only circumstantial, no one knows who the three Indian youth were. The seven accused were arrested at random. In fact the prosecution witness SP13 told the court that ten Indian youth were arrested following the incident and three were released for no apparent reason and were not called as witnesses or offered to the defence (see paras 48–49).

(4) The trust of the prosecution's case was based on circumstantial. There was no direct evidence pointing the seven accused to that crime. In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together points only to the guilt of the accused and it must not be capable of any other meaning. The court was of the view that the chain of evidence was so incomplete that the seven accused could not be responsible for the deceased's death. Any inference or presumption of fact could not be drawn based on mere conjecture where the evidence was too speculative or highly suspicious. Furthermore, the murder weapons retrieved by the police did not

have any finger print evidence or DNA report which could connect any of the accused to the murder. In the circumstances, any benefit of doubts that have arisen must be given to the accused (see paras 52–55).

[Bahasa Malaysia summary

Tujuh orang tertuduh didakwa di bawah s 302 Kanun Keseksaan yang dibaca bersama dengan s 149 Kanun Keseksaan untuk, semasa menjadi ahli kepada perhimpunan haram, menyebabkan kematian si mati. Si mati mengalami kecederaan pada 22 September 2003 dan telah dibawa ke Hospital Sungai Petani pada malam yang sama, pada 23 September 2003, satu pembedahan yang dikenali sebagai kraniotomi telah dijalankan terhadap si mati. Si mati telah mati pada 25 September 2003.

Di akhir kes pendakwaan, pembelaan menghujahkan bahawa: (1) pendakwaan telah gagal untuk membuktikan rantaian penyebab yang mengaitkan kematian si mati pada 25 September 2003 kepada kecederaan yang dialami pada 22 September 2003; (2) pendakwaan telah gagal untuk memanggil mana-mana saksi yang boleh membantu mahkamah berkenaan dengan kecederaan yang dialami si mati dan pembedahan kranatomi yang dijalankan selepas itu; (3) inferens yang sesuai adalah mungkin terdapatnya kesilapan besar semasa melakukan pembedahan kranatomi ke atas si mati yang membawa kepada kematiannya; dan (4) berkenaan dengan isu pengecaman, satu-satunya saksi yang muncul yang sepatutnya melihat si mati diserang pada malam tersebut adalah SP9 tetapi keterangannya adalah sangat mencurigakan, yang mana terdapatnya percanggahan yang penting dengan SP5, bapanya. SP9 mendakwa beliau melihat si mati diserang oleh tiga remaja India. Beliau juga mengecam tertuduh pertama, keempat dan kelima daripada kandang orang salah.

Diputuskan, membebaskan dan melepaskan kesemua tertuduh:

(1) Selepas melalui keterangan dan menggunakan ujian penilaian yang maksimum, tanpa memanggil pakar bedah saraf yang menjalankan pembedahan kranatomi adalah membawa padah kepada pendakwaan. Terdapatnya banyak persoalan yang terbiar tanpa jawapan, seperti jika pembedahan kranatomi tidak dilakukan, mungkinkah si mati akan selamat walaupun dengan kecederaan yang parah. Memanggil pakar bedah saraf dianggap penting kerana ianya boleh sama ada mentahkikkan keterangan SP3 bahawa pembedahan kranatomi bukannya penyebab kematian si mati. Seksyen 114(g) Akta Keterangan 1950 seharusnya dalam keadaan ini disimpulkan. Kegagalan melakukannya akan mengakibatkan kegagalan keadilan (lihat perenggan 43–44).

(2) Berkenaan dengan isu pengecaman, terdapatnya percanggahan yang penting di antara SP5 dan SP9. Juga kejadian berlaku lebih kurang dua tahun lepas daripada tarikh SP9 memberikan keterangan di mahkamah. Tambahan pula pengecaman SP9 diberikan hanyalah pengecaman di kandang pesalah yang mana keseluruhannya tidak memuaskan hati. Ini diburukkan lagi dengan fakta bahawa tiada kawad pengecaman dilakukan bagi saksi-saksi mengecam

mana-mana tujuh orang tertuduh. Berdasarkan keterangan ini, terdapatnya tiada hubungan di antara tiga remaja India dan tujuh orang tertuduh. Tiada seorang pun daripada saksi-saksi pendakwaan telah mengecam mana-mana tujuh orang tertuduh sebagai satu atau tiga orang remaja India yang menyerang si mati (lihat perenggan 45–47).

(3) Bagi mengaitkan tertuduh dengan pembunuhan, pendakwaan mestilah membuktikan bahawa sekurang-kurangnya seorang daripada kesemua tiga remaja India dilihat menyerang si mati bagi s 149 Kanun Keseksaan boleh memberikan kesan. Sebagaimana kedudukan kesemua keterangan hanya berdasarkan keadaan, tiada seorang pun tahu siapa tiga remaja India tersebut. Tujuh orang tertuduh telah ditangkap secara rambang. Sebenarnya saksi pendakwaan memberitahu mahkamah bahawa sepuluh remaja India telah ditangkap berlanjutan daripada kejadian tersebut dan tiga daripadanya telah dilepaskan tanpa sebab yang ketara dan tidak dipanggil sebagai saksi atau ditawarkan kepada pembelaan (lihat perenggan 48–49).

(4) Kepercayaan kes pendakwaan adalah berdasarkan kepada keadaan. Tidak terdapatnya keterangan langsung menunjukkan tujuh orang tertuduh kepada jenayah tersebut. Dalam menangani keterangan berdasarkan keadaan, mahkamah mestilah berpuas hati bahawa keterangan apabila dianggap bersama merukuk kepada kebersalahan tertuduh dan ianya mestilah tidak boleh bermaksud lain. Mahkamah berpendapat rantaian keterangan adalah tidak lengkap yang mana tujuh orang tertuduh tidak boleh dipertanggungjawabkan atas kematian si mati. Sebarang inferens atau anggapan fakta tidak boleh digambarkan berdasarkan kepada tekaan semata-mata yang mana keterangan adalah begitu spekulatif dan sungguh menyangsikan. Tambahan pula, senjata pembunuhan yang diperoleh pihak polis tidak ada bukti cap jari atau laporan DNA yang mana boleh mengaitkan mana-mana tertuduh kepada pembunuhan. Dalam keadaan ini, sebarang kelebihan atas keraguan yang timbul mestilah diberikan kepada tertuduh (lihat perenggan 52–55).]

Notes

For cases on circumstantial evidence on murder, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 632–633.

For cases on failure of prosecution to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 135–141.

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1154–1167.

For cases on prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4939–4952.

Cases referred to

Kamis v PP [1975] 1 MLJ 46 (refd)
PP v Lee Hock Lai [2003] 6 AMR 544; [2004] 1 CLJ 57 (refd)
PP v Logarajah a/l Retnam [2005] 2 AMR (refd)
PP v Looi Kew Chai [2003] 2 MLJ 65 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Sarjeet Singh s/o Halban Singh [1994] 2 MLJ 290 (refd)
PP v Soo Tai Leng [2005] 7 MLJ 363 (refd)

A *Pendakwaraya v Soo Tai Leng* [2005] 7 MLJ 363 (refd)
R v Oliva [1965] 3 All ER 116 (refd)
Raymond Turnball & Ors [1976] 63 Cr App R 132 (refd)
Teh Lee Tong v PP [1956] MLJ 194 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)

B **Legislation referred to**
Criminal Procedure Code s 180
Evidence Act 1950 s 114(g)
Penal Code s 149, 300, 302

C *Azeezi bin Nordin (Deputy Public Prosecutor) for the appellant.*
Jagdeep Singh Deo (Simon Murali with him) (Karpal Singh & Co) for the respondent.

Mohd Sofian JC:

D **[1]** The seven accused persons are charged under s 302 Penal Code read together with s 149 Penal Code. The charge reads as follows:

> Bahawa kamu bersama-sama pada 22 September 2003 jam lebih kurang 12 hingga 12.50 pagi di belakang gerai makan Medan Selera Taman Keladi, Sungai Petani di dalam daerah
E Kuala Muda, di dalam Negeri Kedah Darul Aman sebagai ahli kepada satu perhimpunan haram dalam mencapai tujuan bersama telah menyebabkan kematian ke atas Mohd Feirus bin Idrus (K/P No 800126–14–5623). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 302 Kanun Kesiksaan dibaca bersama s 149 Kanun yang sama.

F **[2]** Section 302 Penal Code is the penal provision for the offence of murder. The offence of murder is defined in s 300 Penal Code which states as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder.
>
> (a) if the act by which, are death is caused is done with the intention of causing death;
>
G (b) if it is done with the intention of causing such bodily injury as the offender knows is likely to cause death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
H (d) if the person committing the act knows that it is so imminently dangerous that it must be in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

I **[3]** The offence of murder as expounded in s 300 of the Penal Code comprises the element of *actus reus* and *mens rea*. Both elements must exist to constitute the offence of murder.

[4] Section 302 of the Penal Code provided whoever commits murder shall be punished with death.

Section 149 Penal Code provides:

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of the offence, is a member of the same assembly, is guilty of that offence.

[5] Section 149 of the Penal Code contains two limbs, which may be outlined as these:

First Limb:

(i) The accused persons were members of an unlawful assembly;

(ii) The members of the unlawful assembly had a common object; and

(iii) The offence was committed in the prosecution of the common object.

Second Limb:

(i) The accused persons were members of an unlawful assembly;

(ii) The members of the unlawful assembly had a common object;

(iii) The members of the unlawful assembly, including the accused persons knew that the offence in question is likely to be committed in prosecution of the common object; and

(iv) The offence was committed in the prosecution of that object.

[6] At the close of the prosecution's case 13 witnesses were called. The evidence led by the prosecution is simple and straight forward which can be briefly stated as follows:

[7] According to SP5, Saidin bin Rashid, the owner of the stalls at No 21 and 22 about 12.15am to 12.50am in the morning of 22 September 2003, a group of Indian youth came to the rear of stalls No 22, 23 and 24 at Medan Selera, Taman Keladi, Sungai Petani in the district of Kuala Muda ransacking his stalls using objects such as parang, baseball bat and iron pipe. The said group of Indian youth banged the tables at the stalls and shouted 'mana Melayu, mana Melayu.' SP5 then asked the Indian youth the reasons for their unruly behaviour and pleaded with them to stop their violent behaviour. The Indian youth refused to heed to the plea made by SP5 and in the ensuing moment SP5 heard someone shouted 'police'. The Indian youth ran and another Indian youth challenged SP5 to a fight threw away the parang. SP5 then caught hold of the said Indian youth and handed him over to SP7 L/Kpl Hamzah Bakar who was designated a Koperal sector for Taman Keladi.

[8] SP5 later made a police report of incident and when he came back to his stalls he saw the chairs and tables scattered and broken on the ground. According to SP5, the Indian youth who came to attack him was estimated to be about 20 people. The Indian youth who was alleged to have held the parang was identified as Samyveloo a/l Ramu, the five accused. SP5 further stated that he used to see the fifth

A accused at Taman Keladi, Sungai Petani and also other accused persons named Vinayagam a/l Shankaran, the seventh accused, Inthiran a/l Renganathan, the first accused.

[9] When the court break for lunch and resumed at 2.15pm. SP5 corrected his
B evidence with regard to the fact that the Indian youth whom he had caught was not the fifth accused but the first accused. SP5 explained that it was because he was confused. SP5 also said that he could not identify the other accused persons.

[10] In cross-examination, SP5 admitted that in the police report (P9) he did not
C mention about the baseball bat and the iron pipe but he said he had told the police about the baseball bat and the iron pipe. SP5 further stated that he was confused regarding the identity of the Indian youth whom he had apprehended because the incident happened about two years ago and could not be sure when giving evidence in the morning.

D **[11]** The prosecution also called SP4 to the stand to given evidence wherein SP4 stated that at about 12 midnight on 22 September 2003 he saw a fight at stalls No 21 and 22. SP4 saw a group of Indian youth attacking the customers at the said stalls. SP4 remembered that the Indian youth were numbered between five or six persons. One of the Indian youth who attacked the customers at stalls No 21 and 22 had a
E parang with the length of three feet. At that time SP4 was about 60 to 70 feet away from the stalls No 21 and 22. SP4 further stated that he saw an Indian youth being detained by the policeman named L/Kpl Hamzah (SP7). SP4 had not seen this particular Indian youth before. He saw L/Kpl Hamzah retrieving a parang from the Indian youth who was arrested.

F **[12]** During cross-examination by the learned defence counsel for the accused persons, SP4 had only assumed that the Indian youth who was arrested by the police was involved in the attacked on the customers at stalls No 21 and 22 because he saw the police handcuffed him. SP4 did not see the said Indian youth holding the parang.

G **[13]** The evidence provided by SP6 Nor Azhar bin Abd Halim described how he saw three Indian youth one was holding an object shinning resembling a golf club or an iron rod, assaulting the deceased who had already fallen down. The other two Indian youth were keeping an eye. The distance from where he witnessed the incident was about 20 feet. SP6 could not identify any of the Indian youth as it was dark.
H SP6 later said that he saw two parang, one was curve and the other was a normal parang.

[14] SP9 Mohd Jefry bin Saidin gave evidence that on the night of 22 September, 2003 while having supper at the stalls No 21 and 22, he saw a group of Indian youth
I entered the said stalls from the rear carrying a parang. He heard a commotion at the rear and went to investigate. SP9 saw a group of Indian youth with a baseball bat, parang, iron hammer and an object which resembled a rake. SP9 further stated that he saw the deceased walking home which was opposite the rear of his stalls. He saw the deceased being assaulted but could not do anything to stop the assault as the Indian youth had pointed the parang at him. SP9 also confirmed that he saw three

Indian youth assaulting the deceased at a distance of about 25 meter. The lighting was not bright, blurred but later SP9 claimed that the lighting was bright because of the light at the rear of the stalls. It was lit up by a fluorescent light.

[15] During cross-examination of SP9 by the learned defence counsel for the accused persons, he again confirmed that he saw the deceased being assaulted while his father SP5 was holding one of the Indian youth. There was no mentioned of the three Indian youth who had assaulted the deceased. All SP9 said was he could identify the third accused as holding the baseball bat, the fourth accused as the person who chased his customers and fifth accused as the one who pointed the parang at him and also the first accused as the person who was apprehended by his father, SP5. The rest of the evidence also related to identifying the baseball bat, parang, rake, and a broken wood.

[16] In this case, there were two investigating officers assigned to investigate the incident. The first was SP12 C/Insp Azlan bin Abd Kadir. He said on 22 September, 2003 he was asked to investigate an assault case at Medan Selera, Taman Keladi, Sungai Petani. He received the information from L/Kpl Adnan. There was a first information report made by L/Kpl Adnan (P3). He visited the deceased at the Sungai Petani Hospital and was informed by L/Kpl Adnan that the deceased was in coma. SP12 then proceeded to inspect the place of the incident at Medan Selera, Taman Keladi, Sungai Petani. Photographs were taken by L/Kpl Roslan. At the place of the incident, he retrieved the exhibits such as chairs, tables, one long parang, one iron rod, one iron pipe, a rake, a broken stick, a rounded wood and a baseball bat. He also arrested the seven accused persons. Sketch plan and key was drawn and prepared by him. He continued his evidence and said that the deceased was found lying unconscious at the road side near the Rela Office. The items which he had retrieved were then handed over to another investigating officer SP13 ASP Lim San Aik. SP12 did not ask the first accused as to the cause of his injuries but had sent the first accused to the hospital for treatment.

[17] The evidence of SP13 ASP Lim San Aik who was the senior investigating officer for the IPD Kuala Muda confirmed taking over the conduct of the investigation into this case as there was an element of riot involved. He also confirmed that he received the items retrieved from SP12. SP13 then sent the nine envelopes containing the exhibit to the Chemist Department for analysis. Other than that SP13 also sent the clothings of the seven accused persons and blood samples belonging to the fourth, sixth, third and that of the deceased. No blood samples were sent in respect of the second, fifth and seventh accused persons. All these items were sent to the Chemist Department in Petaling Jaya for DNA profiling. The DNA report from the Chemist Department was negative. SP13 informed the court that ten persons were arrested following the incident. Seven persons were charge and three others were released.

[18] The other important witness who was called to testify was SP3, Dr Mohd Suhani bin Mohd Noor. He performed an autopsy on the deceased at the Sungai Petani Hospital on 25 September 2003. He stated in evidence that the deceased did not die instantly but died three days after the incident ie on the 25 September 2003.

[19] SP3 conducted both external and internal examination on the deceased which are as follows:

Kecederaan-kecederaan luaran yang berikut didapati:

(1) Suatu luka koyak yang berjahit sepanjang 3 cm. Pada kulit kepala sebelah tepi kanan, iaitu ke hadapan kesan pembedahan yang dinyatakan tadi.

(2) Lebam kulit kepala sebelah atas berukuran 7 x 4 cm

(3) Lebam kulit kepala sebelah tepi kanan berukuran 4 x 3 cm berhampiran dengan kesan pembedahan.

(4) Luka berkeruping di atas hidung.

(5) Kesan lebam pada telinga kanan.

(6) Kesan lebam pada bahagian belakang badan sebelah atas berserta kesan-kesan lebam yang memanjang antara kesan-kesan lebam yang memanjang antara 4 hingga 11 cm.

(7) Dua kesan lebam memanjang yang panjangnya 11 cm dan 12 cm yang selari berbentuk seperti landasan ataupun tramp-line pada bahagian tengah belakang badan sebelah kanan.

(8) Dua kesan lebam memanjang yang panjangnya 4 cm dan 6 cm dan selari seperti landasan pada bahagian belakang lengan atas sebelah kanan.

(9) Luka-luka berkeruting pada buku lima tangan kanan dan pada bahagian belakang jari-jari manis tangan kanan.

Pemeriksaan dalaman pada bahagian kepala menunjukkan:

(1) Pendarahan bawah kulit kepala yang teruk.

(2) Kesan pembedahan craniotomy berukuran 10 x 11.5 cm. pada tepi kanan tempurung kepala, iaitu, kawasan parietal temporal dan frontal sebelah kanan. Walau bagaimanapun, tulang-tulang yang telah dikeluarkan ketika pembedahan tersebut tiada lagi untuk pemeriksaan. Pada bahagian tengkorak ada terdapat tiga keretakan yang menjalar (radiate out) daripada tepi kesan craniotomy, iaitu, satu keretakan yang menjalar ke belakang tengkorak dan seterusnya ke bahagian dasar tengkorak. Satu lagi keretakan yang menjalar ke hadapan tengkorak dan seterusnya ke dasar tengkorak bahagian hadapan. Akhirnya, keretakan yang menjalar ke dasar tengkorak sebelah kanan.

(3) Terdapat pendarahan selaput otak.

(4) Otak bengkak dan terherot ke kiri. Terdapat kesan lebam serta luka-luka koyak pada permukaan otak sebelah kanan. Terdapat juga pendarahan-pendarahan kecil pada tisu dalaman otak sebelah kanan. Bahagian belakang sebelah kiri otak juga lebam dan terdapat pendarahan di dalam batang otak (brain stem).

[20] SP3 was subjected to extensive cross-examination by the learned defence counsel wherein he said that before performing the autopsy, he had noticed that the victim's skull had signs that a craniotomy surgery had been done. He described that a craniotomy surgery is usually done by a well trained and experience surgeon as the procedure involved is complicated. SP3 also said by looking at the CY Scan record regarding the craniotomy surgery it provided information when conducting the autopsy on the deceased. The CY Scan was carried out by a radiologist, Dr Adnan Ramli at Strand Specialist Hospital, Sungai Petani as the Government Hospital in Sungai Petani does not have such facility. According to SP3, the craniotomy surgery

was carried out for purposes of treatment whereas the autopsy was done to determine the cause of death. The surgeon who performed the craniotomy surgery would be able to ascertain when exactly did the injuries happen and the autopsy would be to determine the duration of the injuries. SP3 further informed the court that it was important to determine the *pembengkakan dan pengherotan otak berlaku.* The surgeon who performed the craniotomy surgery was the best person to ascertain when it happened. SP3 also testified that the mechanism that caused the deceased to die was the increase of pressure in the cranium (the inner part of the skull). This condition (the pressure increase inside the cranium) was the result of the swelling of the brain. The swelling of the brain occurs due to response of the rain tissues to any injury or bleeding in the brain tissues or the meninges. SP3 also confirm that the post-mortem observation of injuries on a dead person who died instantly differs from that of a person who died at a later date after sustaining the injuries. Be that as it may, SP3 in his autopsy report (exh P8) concluded that the cause of death as being head injury due to blunt trauma. When SP3 was recalled by the defence counsel with regard to whether a parang as seen in exh P5(G) could have caused the injuries as in exhs P6(E) & (F), he replied probably not. SP3 also agreed that another parang as seen in exh P5(I) and (H) could not have caused the injuries as seen in exh P6(l).

[21] The learned defence counsel for the accused persons submitted to the court at the end of the prosecution's case as follows:

> That the deceased did not meet an instantaneous death. The deceased sustained injuries on 22 September 2003 and was brought to the Sungai Petani Hospital the same night. On 23 September 2003, a surgical procedure known as craniotomy was conducted on the right parietal side of the head. The said operation was done between 6.05am to 7.10am. The deceased died on 25 September 2003, at 7.35pm. The learned defence counsel further submitted it remains unclear why the deceased was subjected to this major surgery. The exact nature of the injuries sustained by the deceased has not been medically proven.

[22] The learned defence counsel further submitted that the prosecution failed to call any witnesses who could have assisted the court in regard to the injuries sustained by the deceased and the craniotomy surgery which was performed subsequently. According to the learned defence counsel, SP3's involvement was only with regard to performing the autopsy and was not in the position to confirm or verify the medical management of the deceased prior to his death.

[23] The prosecution has failed to establish the chain of causation linking to the death of the deceased on 25 September 2003 to the injuries sustained on the 22 September, 2003.

[24] The learned defence counsel referred to the case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 at p 438, *it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not.* (see *Teh Lee Tong v PP* [1956] MLJ 194). *That discretion, however must be exercised having regard in the interest of justice, which includes being fair to the accused* (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 at p 122; *and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based whether the effect of their testimony is for or against the prosecution.*

[25] No evidence was adduced in court whether any statements were recorded from the surgeon who performed the craniotomy surgery by either SP12 or SP13. Failure to record any statements from the surgeon who performed the craniotomy surgery could only invoke the presumption under s 114(g) of the Evidence Act 1950.

[26] The learned defence counsel for the accused persons further submitted that if there were two inferences, the inference favourable to the accused persons ought to be accepted. The favourable inference was that there could have been a blunder during the craniotomy surgery done on the deceased that led to his death, (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 at p 399 para B).

[27] The prosecution on the other hand submitted that the death of the deceased was a result of head injuries due to blunt trauma. This was confirmed by prosecution witness SP3 who performed the autopsy on the deceased. The prosecution further submitted that the injuries sustained by the deceased on the head could have been caused by the objects as seen in the photographs exh P5A–G. The injuries on the deceased was not consistent with the injuries sustained during a fall on a hard surface.

THE ISSUE OF IDENTIFICATION

[28] The next frontal attack made by the learned defence counsel for the accused persons was on the issue of identify. According to the learned defence counsel, the only witness who appeared to have seen the deceased being assault on that night was SP9 but his evidence is extremely suspicious. The narrative given by SP9 in respect of the situation was in material contradiction with that of SP5, his father. SP9 said that when he went to the back of his stalls, he saw the first accused being apprehended by SP5. According to him, SP5 grabbed the first accused by his shirt and held on to him. Simultaneously, the first accused held a parang and waving it towards SP5. It was then he spotted the deceased walking a distant away. All of a sudden the deceased was pounded by a group of men. SP9 told SP5 that the deceased was being attacked. Then the police came and the Indian youth ran away. The first accused was handed to the police. SP9 and his friends went to the aid of the deceased and carried to the stall. Yet, SP5 made no mention about this in his evidence or in the police report. The learned counsel further submitted that, if the assault upon the deceased happened within the view of SP9, it would have been witnessed by SP5 as well. At least SP5 would have known about it due to being informed by his son, SP9. but no where in his evidence did SP5 mention that his son informed him of the assault on the deceased. Whatever seen by SP5 was reflected in his police report (exh P9). Again, there was no mention about the alleged assault. This clearly shows that the dramatic event that purported to have unfolded before the eyes of SP9 never actually took place. In the light of such material contradictions, the evidence of SP9 with regard the assault on the deceased is absolutely unreliable. The prosecution cannot rely on such evidence to prove the assault on the deceased as thee was no credible evidence to show what actually happened to the deceased.

[29] The learned counsel for the accused persons further submitted that the circumstantial evidence adduced by the prosecution falls short of linking the accused persons to the death of the deceased. In this case only SP9 identified more than one

accused persons. Besides the first accused, SP9 saw the fourth and the fifth accused in the accident. As there was no identification parade held, SP9's evidence on the identity of these accused persons was based on dock identification. SP9 testified on 23 September 2005, more than two years after the incident. SP9 also had stated that the lighting was not bright because the street light was block by the tree and the distance when SP9 was alleged to have seen the three persons assaulting the deceased was about 25 meter. The lighting which SP9 said was bright was at the rear of the stall and not at the place where the deceased was alleged to have been assaulted by the three Indian youth. These accused persons were unknown to SP9.

[30] No evidence was elucidated from either SP12 or SP13 as to why no identification parade was carried out. It was further submitted by the learned counsel that the failure to hold an identification parade, though may not vitiate the trial, would give rise to the lurking suspicion that if such a parade was conducted. SP9 would not have been able to identify these accused persons. It affects the credibility of SP9 in regards the dock identification (*Public Prosecutor v Sarjeet Singh s/o Halban Singh* [1994] 2 MLJ 290).

[31] The prosecution was alleged to have retrieved exhibits such as a parang and a baseball bat (exhs P10 & P18 respectively) but these exhibits have no blood stains on any of them to indicate the link to the deceased's injuries. The prosecution failed to adduce any finger print evidence to suggest that the exhibits were handled by an of the accused persons. The learned counsel for the accused persons also submitted that the nature of the investigation leaves much to be desired. There was no identification parade and no finger print on the suspected weapons of the crime. There was no investigation on the cause of the fracas on that night. Neither SP12 nor SP13 could provide the court with evidence how the one accused had suffered injuries. SP12 did not bother to investigate or even ask the first accused how he was injured. The learned defence counsel in conclusion submitted that since the prosecution has failed to prove the actus reus of the offence of murder, it would be futile to embark any further to discuss other issues and urge the court to acquit the accused persons without their defence being called.

SUBMISSION BY PROSECUTION

[32] The prosecution in its rebuttal submission submitted that as far as to the cause of death of the deceased, SP3 had confirmed that the deceased died due to head injuries due to blunt trauma. It has nothing to do with the craniotomy surgery done on the deceased prior to his death. The prosecution further submitted that SP9 saw a group of Indian youth at the rear of his father's stalls (SP5) but at the same time SP9 also saw the deceased being assaulted by three persons whom he confirmed were Indian. Based on this evidence the conclusion by the prosecution was that the deceased died due to the injuries caused by blunt trauma on the head and it was done by the Indian youth.

THE FINDING OF THE COURT

[33] At the close of the prosecution's case, after considering the evidence and the submissions of the respective parties, I held that the prosecution had not made out

a prima facie case and, consequently acquitted and discharged all the seven accused persons. The prosecution has now appealed against that decision.

[34] Section 180 of the Criminal Procedure Code ('CPC') sets out the procedure to be followed by the court at the conclusion of the prosecution's case as follows:

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the court finds that a prima facie case against the accused, the court shall record an order of acquittal.

(3) If the court finds that a prima facie case has been made out against the accused, the court shall call upon the accused to enter on his defence.

[35] In order to ascertain whether a prime facie case had been made out the court must undertake a maximum evaluation of the evidence adduced by the prosecution.

[36] In *Public Prosecutor v Lee Hock Lai* [2003] 6 AMR 544; [2004] 1 CLJ 57, the court held that:

> … a maximum evaluation would require a proper and complete evaluation of all the evidence adduced to determine whether a prima facie case has or has not been made out. Thus, all the evidence adduced has to be scrutinized properly and this should not be just a perfunctory cursory evaluation or an exercise of skimming over the surface of the evidence only. The prosecution must make out the ingredients of the charge with the evidence adduced. If the evaluation of the evidence results in doubts in the prosecutions case at this stage of the proceedings itself it cannot be said a prima facie has been made out The defence counsel ought not to be called merely to clear or clarify the doubts. The benefits of the doubt if any at the end of the prosecutions case must go to the accused.

[37] The test formulated by the Court of Appeal in *Public Prosecutor v Looi Kew Chai* [2003] 2 MLJ 65 which discussed the duty of the court at close of prosecution case is the same test as in the case of *Lee Hock Lai*. It was re-affirmed in case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 397 by the Federal Court.

[38] In the present case there is no dispute that the deceased died. The question was whether the death was due to the injuries inflicted by accused persons or whether the death was caused by an intervening circumstances that is due to the surgical procedure known as craniotomy. Craniotomy is a surgical procedure which is to be done with precision involving the drilling of holes on the skull of the patient and the removal of the fragment. According to SP3 this was normally done by a neurosurgeon.

[39] The learned defence counsel in his submission submitted that the neurosurgeon who performed the craniotomy procedure should have been called to dispel any lurking doubts as to the actual cause of the death of the deceased.

[40] The learned deputy public prosecutor on the other hand submitted that the caused of death of the deceased was due to head injuries due to blunt trauma and not due the craniotomy surgery on the deceased.

[41] In the case of *Public Prosecutor v Logarajah a/I Retnam* [2005] 2 AMR at p 226 the learned judicial commissioner referred to the case of *Ti Chuee Hing v Public Prosecutor* and the need to call relevant witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt.

[42] In *Pendakwaraya v Soo Tai Leng* [2005] 7 MLJ 363 briefly the facts revealed that the deceased was sent to the Johor Specialist Hospital for treatment due to severe burn injuries on 21 June, 2003. The deceased was treated by SP8. On 22 June, 2003 the deceased was sent for further treatment at the Singapore General Hospital and died on 2 July 2003 where the post-mortem was done SP9. The facts of the above case revealed that both the doctors who treated the deceased at the Johor Specialist Hospital and the doctor who performed the autopsy were called as witnesses for the prosecution.

[43] I am of the view that after going through the evidence and using the maximum evaluation test, the non-calling of the neurosurgeon surgeon who performed the craniotomy surgery was fatal to the prosecution. There were many questions which remain unanswered for example if the craniotomy surgery had not being done, would the deceased have survived despite the severe injuries.

[44] I am of the view that the calling of the neurosurgeon was of considerable significance because it could have either corroborated SP3's evidence that the craniotomy surgery was not the caused of the deceased's death. Section 114(g) of the Evidence Act 1950 should in these circumstances, have been drawn. The failure to do so would have occasioned a miscarriage of justice.

[45] On the issue of identification, there were material contradictions between SP5 and SP9. It was only SP9 who claimed to have seen three Indian youth assaulting the deceased when he was near to his father. SP5 did not mention at all the fact that he saw the three Indian youth assaulting the deceased. The Court also took into account that the alleged witnessing of the assault was seen by SP9 from a distance of about 25 meter and the condition of the light was poor due to the fact that the street lights were blocked by trees. It was only at the rear of the stalls where the lights were bright. What was important was what transpired when SP9 saw the assault under poor lighting condition (see the case of *Raymond Turnball & Ors* [1976] 63 Cr App R 132 for guidelines).

[46] Bearing in mind that the incident happened about two years ago from the date SP9 gave evidence in court. SP9 identification was merely dock identification which was wholly unsatisfactory. This was compounded by the fact that there was no identification parade held in order for the witnesses to identify any the seven accused persons.

A **[47]** In the light of this evidence, where was the nexus between the three Indian youth and the seven accused persons. None of the prosecution witnesses had identified anyone of seven accused persons as one or three Indian youth who had assaulted the deceased.

B **[48]** In order to implicate the accused persons with murder, the prosecution must proved that at least one or all the three Indian youth were seen assaulting the deceased in order for s 149 of the Penal Code to come into effect.

C **[49]** As its stands all evidence was only circumstantial, no one knows who the three Indian youth were. The seven accused persons were arrested at random. In fact the prosecution witness SP13 told the court that ten Indian youth were arrested following the incident, three were released for no apparent reason and were not called as witnesses or offered to the defence.

D **[50]** It was not the function of the court to travel outside the material on record for the purpose of finding the guilt or otherwise. That was the job of the investigating agency and the prosecution.

E **[51]** The court regrets the loss of an innocent life but the court was also mindful not to send the wrong persons to the gallows:

> Section 149 creates a specific offence. A member of the assembly would be guilty of an offence committed by another member although he had no intention to commit that offence and had done no other act except his presence in the assembly and sharing its
F common object.

[52] The trust of the prosecution's case was based on circumstantial. There was no direct evidence pointing to the seven accused persons to that crime.

G **[53]** In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together points only to the guilt of the accused and it must not be capable of any other meaning (see *Kamis v Public Prosecutor* [1975] 1 MLJ 46).

H **[54]** The court was of the view that the chain of evidence was so incomplete that the seven accused persons could not be responsible for the deceased's death. Any inference or presumption of fact cannot be drawn base on mere conjecture where the evidence was too speculative or highly suspicious.

I **[55]** The murder weapons retrieved by the police do not have any finger print evidence or DNA report which could connect any of the accused persons to the murder. In the circumstances, any benefit of doubts that have arisen must be given to the accused persons.

[56] In conclusion, the prosecution in my view had not made out a prima facie case to warrant the seven or anyone of the accused persons defence to be called. Consequently, I acquitted and discharged the accused persons.

Accused acquitted and discharged.

Reported by Loo Lai Mee